NO. 86-1043

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

JULIO T. GONZALEZ,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1) Whether the Trial Court committed procedural error in granting Shell Oil Company's Motion to Dismiss.

2) Whether, under Florida law, the word "gallon", as used in the Shell Oil Company Dealer Agreement, is ambiguous.

II

PARTIES

Petitioner Julio T. Gonzalez, a Shell Oil Company dealer residing in Florida, is suing on behalf of himself as well as all other Shell Oil Company gasoline dealers whose point of delivery is located where the annual average ambient isotherm exceeds 60°F.

Respondent Shell Oil Company wholly owns all of the stock of Scallop Coal Corporation and Shell Energy Resources Inc., which company wholly owns all of the stock of Pecten International Company, Shell California Production Inc., Shell Offshore Inc., Shell Mining Company, and Shell Western E&P Inc. All of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60 percent by Royal Dutch Petroleum Company and 40 percent by Shell Transport and Trading Company, a Public Limited Company in London, U.K. Shell Oil Company also wholly owns directly or indirectly a number of companies. The following companies are affiliated with Shell Oil Company or one of the affiliates named above, but are not wholly owned subsidiaries:

Quazite Corporation
First Harlem Securities Corporation
Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston

Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Pioneer Equipment Co.
Seadock, Inc.
Pecten Cameroon Company
Thums Long Beach Company
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Cortez Capital Corporation
Plastibeton, Inc.
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Lone Star Polymer Concrete Corporation
General Hydrocarbon Polymer Concrete Inc.
Polycon Research, Inc.
Morrison Molded Fiber Glass Company
Premix/E.M.S. Inc.
Knytex, Inc.
CRI Ventures, Inc.
Glastrusions, Inc.
Glass-Steel, Inc.
Huntsman Chemical Company
Lucky Chance Mining Company, Inc.
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Shell Oil Company, Respondent herein and Appellee and Defendant in the courts below, submits this Brief in Opposition to Petition for Writ of Certiorari, in accordance with Rule 22 of this Court.[1]

1. Sup. Ct. R. 22.

COUNTERSTATEMENT OF THE CASE

By this lawsuit, Plaintiff/Petitioner Julio T. Gonzalez, an operator of a Shell gasoline service station in Miami, Florida, sought to have the District Court certify him to be the representative of a class, consisting of all Shell gasoline dealers whose point of delivery is located where the average temperature of the air exceeds 60° Farenheit (paragraph 13 of Complaint, R. 6),[2] to declare that the Dealer Agreement which Plaintiff signed with Shell (Exhibit "A" to the Complaint, R. 11-25) requires that the price charged by Shell for all gasoline delivered to any member of the class be adjusted to reflect temperature variations, and to award damages for all gasoline sales made which did not reflect such temperature variations. Approximately four months after the Complaint was filed, the District Court, after reviewing the 36 pages of exhibits which had been attached to the Complaint (R. 11-46), determined that "[t]he contract by its own terms clearly makes no requirement that the gasoline delivered under the contract need be adjusted for temperature variations" (R. 152; P. App. 10), and dismissed the case with prejudice on the basis that the Complaint failed to state a cause of action against Shell upon which relief can be granted. No determination was ever made with respect to the class certification request.

Subsequently, Petitioner moved to vacate the Order of Dismissal, requested oral argument on his Motion to Vacate, and moved for Summary Judgment. Each of these motions, along with Plaintiff's Motion for Leave to File Amended Complaint, was denied by the District

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2. References to the pages of the Record Excerpts will be made by use of "R." Petitioner's Appendix will be referred to as "P. App."

Court. (R. 153-154). Petitioner Gonzalez's appeal to the United States Court of Appeals for the Eleventh Circuit was denied on July 31, 1986 (P. App. 1) in an Opinion stamped "Do Not Publish".

ARGUMENT

Petitioner contends that this is a case of first impression. To the extent that no two cases have identical fact patterns, this is probably a case of first impression. There is, however, no novel issue of law presented in this diversity action. Neither is there any important question of federal law nor is there any previously unsettled issue involved in this Petition. As will be shown below, and as recognized by the Eleventh Circuit, no procedural error was committed by the District Court and there was no misapplication of Florida law to the case.

A. The Trial Court Committed No Procedural Error In Granting Shell's Motion To Dismiss

Petitioner bases his procedural complaints upon the naked conclusion that the Trial Court's order granting Defendant's Motion to Dismiss was a *sua sponte* order in violation of the Eleventh Circuit's own opinion in *Jefferson Fourteenth Assoc. v. Wometco de Pureto Rico,* 695 F.2d 524 (11th Cir. 1983). Simply stated, however, the Eleventh Circuit reviewed Chief Judge King's handling of this case and concluded that "the dismissal here was not a *sua sponte* action by the Court reversible under *Jefferson Fourteenth Assoc.* . . . ." (P. App. 4). The Circuit Court went on to point out that the District Court had granted Shell's Motion to Dismiss and, further, that any due process problems were cured when the

District Court considered Petitioner's Motion for Reconsideration (P. App. 4-5).

Although the Circuit Court had concluded that the District Court's opinion was not a *sua sponte* action, falling within its own *Jefferson Fourteenth Assoc.* opinion, Petitioner, at no point in his Petition for Writ of Certiorari, attempts to explain why the Circuit Court erred in concluding that the District Court's opinion was not a *sua sponte* action. See Petition at 6, 16-17.

Assuming, however, that the Eleventh Circuit was in error and that the order was a *sua sponte* action by the District Court, such procedure does not constitute reversible error.

Recently, the Fifth Circuit was faced, apparently for the first time, with a set of facts very similar to those at bar. *Shawnee Int'l., N.V. v. Hondo Drilling Co.*, 742 F.2d 234 (5th Cir. 1984). In response to the Complaint, Hondo moved for a Rule 12(b)(6) dismissal. Shawnee then moved to amend its Complaint. The District Court then dismissed the Complaint. In response to Shawnee's argument that the District Court had committed error in dismissing the case *sua sponte*, the Fifth Circuit held, *id.* at 236,

> Shawnee argues that the district court's dismissal was unlawful in that the court acted *sua sponte* before Hondo moved for such relief. We do not so construe the record, but even if it were so, we reject this argument and align ourselves with our colleagues in the other circuits who have held that a district court may dismiss a complaint on its own motion for failure to state a claim. *Pavilonis v. King*, 626 F.2d 1075 (1st Cir. 1980); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980); *Bryson v.*

> *Brand Insulations, Inc.*, 621 F.2d 556 (3d Cir. 1980); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059 (6th Cir. 1984); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194 (7th Cir. 1977); *Silverton v. Dept. of the Treasury*, 644 F.2d 1341 (9th Cir. 1981) . . .

In addition to the six United States Circuit Courts referred to above, as well as the Fifth Circuit, the Eighth Circuit has also joined the ranks of those Circuits approving of the procedure by which a District Court dismisses a case, *sua sponte*, for failure to state a claim. See *K/O Ranch, Inc. v. Norwest Bank*, 748 F.2d 1246, 1248 n.3 (8th Cir. 1984). Thus, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have specifically approved of the procedure which Petitioner complains was inappropriate.

The conclusion that a District Court has the right to dismiss a case *sua sponte* for failure to state a cause of action is obviously correct. As was noted by the United States Supreme Court, in a related area, "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" *Link v. Wabash R.R.*, 370 U.S. 626, 630-631, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962). See also *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983).

Additionally, there is no greater hardship worked on a plaintiff when the court dismisses a case *sua sponte* than when the plaintiff has the opportunity to respond to the defendant's motion to dismiss. As recognized by

the Fifth Circuit, a plaintiff still has the opportunity to move for reconsideration, as Petitioner did do in this case, as well as to appeal the dismissal, as Petitioner obviously did. See *Bierman v. Tampa Elec. Co.*, 604 F.2d 929, 930 (5th Cir. 1979).

The last question to be addressed with respect to whether the District Court committed procedural error in handling this matter is whether Chief Judge King applied the proper test in assessing that the case should be dismissed on the pleadings. Petitioner never argues with the standard followed by Chief Judge King in his order of dismissal and fails even to mention the cases cited by the District Court. The obvious reason for this omission is that the District Court applied the proper standard. As observed in the Order Granting Defendant's Motion to Dismiss (R. 151-152; P. App. 9-10),

> [W]hen considering a motion to dismiss the court must view the facts as plead in the light most favorable to the Pleader and it is the general rule that a complaint should not be dismissed unless under no conceivable set of facts could the Plaintiff recover. *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172 (5th Cir. 1968), *Poston v. American President Lines*, 452 F.Supp. 568 (S.D. Fla. 1978).

As shown above, there can be no question but that the District Court acted well within the bounds of acceptable judicial conduct in addressing the merits of this case, pursuant to Rule 12(b)(6). The Federal Rules of Civil and of Appellate Procedure provide adequate safeguards, should a plaintiff believe that the district judge has made a mistake.

B. Under Florida Law, The Word "Gallon", As Used In The Shell Oil Company Dealer Agreement, Is Not Ambiguous

As has been shown above, the District Court did not err in the procedural steps taken in dismissing the Complaint for failure to state a cause of action. The issue now becomes whether the District Court erred in its decision to dismiss the Complaint. As will be shown below, there was no error by the District Court.

The Circuit Court agreed with the District Court that the Dealer Agreement is a standard form contract typical of the type entered into by Shell with its dealers in Florida and that it makes no reference to the requirement of temperature adjustment in the sale of gasoline by Shell to its dealers. The Circuit Court then adopted the District Court's conclusion that "The parties clearly could have contracted for delivery of gasoline in temperature compensated amounts but failed to do so." This conclusion, the Circuit Court decided, is consistent with Florida franchise contract law, citing the case of *Trail Burger King, Inc. v. Burger King of Miami, Inc.*, 187 So.2d 55 (Fla. 3d Dist. Ct. App. 1966) (P. App. 3).

It is of interest that Petitioner never addresses the *Trail Burger King* case in his Petition; nor does Petitioner argue with the conclusion that the parties could have contracted with respect to temperature compensation, but did not. Instead, Petitioner argues that "The inequity of this situation is self-evident," (Petition at 12) and that this case may be Petitioner's "only chance" to recover for these inequities. (Petition at 13) In support of this conclusion, Petitioner cites the case of *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1512 (11th

Cir. 1984). The problem with relying upon this case is that it was reversed by this honorable United States Supreme Court. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985).

The courts below have, in addition, pointed out that, although some states require temperature adjustment on the sales of gasoline by an oil company to its dealers, Florida law imposes no such requirement. (P. App. 3-4, 10) Thus, there is no prohibition against the intention of the parties, as expressed in the contract, not to have sales reflect temperature correction.

Whether a contract is ambiguous under Florida law is a question of law for the court; for, "[w]hen a contract is clear and unambiguous, . . . the court cannot give it any meaning beyond that expressed." *Bay Management, Inc. v. Beau Monde, Inc.,* 366 So.2d 788, 791 (Fla. 2d Dist. Ct. App. 1978). As pointed out by the Florida Supreme Court, "To hold otherwise would be to do violence to the most fundamental principle of contracts." *Hamilton Constr. Co. v. Board of Public Instruction,* 65 So.2d 729, 731 (Fla. 1953). See also, *City of Winter Haven v. Ridge Air, Inc.,* 458 So.2d 434, 435-436 (Fla. 2d Dist. Ct. App. 1984).

Try as he might to have the courts re-write the contract, Petitioner is met with the District Court's conclusion that the contract is unambiguous. As the Order points out, "The parties could have contracted for such a temperature compensation but they failed to do so." (R. 152; P. App. 10). This conclusion is consistent with the law of Florida, which recognizes that "where a contract is silent as to a particular matter, courts should not,

under the guise of construction, impose on parties contractual rights and duties which they themselves omitted." *BMW of North America, Inc. v. Krathen,* 471 So.2d 585, 587 (Fla. 4th Dist. Ct. App. 1985).

Having found no uncertainty in the terms as a matter of law, courts are prohibited from re-writing the contract so as to adopt appellant's asserted interpretation of the contract. See *Solis-Ramirez v. United States Dept. of Justice,* 758 F.2d 1426, 1429 (11th Cir. 1985).

Petitioner should not now be heard to argue that the contract means something other than the plain meaning found therein. Petitioner chose to attach a copy of his contract to the Complaint. (R. 11-25) Having done so, Rule 10(c), of the Federal Rules of Civil Procedure, makes the contract a part of the pleadings for all purposes, including a Rule 12(b)(6) dismissal. An observation by the Fifth Circuit in the early case of *Simmons v. Peavy-Welsh Lumber Co.,* 113 F.2d 812, 813 (5th Cir. 1940), is as appropriate here as it was then.

> This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much and has refuted his own allegations by setting forth the evidence relied on to sustain them. * * * Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.

See also, *Nishimatsu Construction Co., Ltd. v. Houston Nat'l. Bank,* 515 F.2d 1200, 1207 (5th Cir. 1975). As in *Simmons,* the litigant and pleader here was and is "defeated . . . by his own exhibits." Accord, *General Guaranty Ins. Co. v. Parkerson,* 369 F.2d 821, 825

(5th Cir. 1966), affirming dismissal of Plaintiff's Complaint and suit, and stating apropos of this suit, that

> [t]his complaint is plagued not by what it lacks, but by what it contains. All of the paths to relief which the pleader suggests are blocked by the allegations and the attached documents themselves, without more.

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is not such a case. The decision of the Eleventh Circuit Court of Appeals was fully consistent with established legal principles.

Respectfully submitted,

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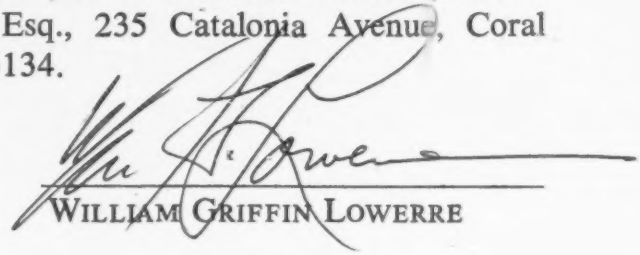
DATED: February 18, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by deposit with the United States Post Office, first class postage prepaid, on this the 18th day of February, 1987, to counsel for Petitioner, Albert Peter Walter, Jr., Esq., 235 Catalonia Avenue, Coral Gables, Florida, 33134.



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